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80-2018

No.

In The

Supreme Court of the United States

October Term, 1980

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTIONS PRESENTED

In 1978 Petitioner was convicted on his plea of guilty of sale of a controlled substance. As allowed under New York State law at the time, he appealed on the basis of the denial of his motion for dismissal under the state "speedy trial" statute. The Appellate Division upheld his claim and reversed the conviction.

After granting the People leave to appeal in Petitioner's case, the Court of Appeals, in another case, stated that a plea of guilty operates as a waiver of a statutory speedy trial claim, overruling prior New York law. Thereafter the Court of Appeals applied this new rule to Petitioner: It held that Petitioner's 1978 plea constituted a waiver of his speedy trial claim, reversed the Appellate Division and reinstated the conviction and life sentence.

The questions presented are:

1. Does the retrospective application of the newly announced waiver rule violate the Petitioner's right to due process of law?

2. Does the same ruling deprive Petitioner of his right to equal protection of the laws by unreasonably disadvantaging him compared to others, including those who are confronted with plea opportunities after the announcement of the new waiver rule?

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In The

Supreme Court of the United States

October Term, 1980

No.

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner, EDWARD THILL, prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals, reversing the judgment of the Appellate Division of the Supreme Court, Fourth Judicial Department, and reinstating his conviction in the Supreme Court, Monroe County, New York.

OPINIONS BELOW

The opinion of the Appellate Division, reported at 75 A.D.2d 709, 427 N.Y.S.2d 125 (1980) is reprinted as Appendix C. The memorandum of the Court of Appeals, reported at 52 N.Y.2d 1020 (1981) is printed as Appendix A. The final order of the Appellate Division, not yet reported, is printed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1981. The case was remitted to the Appellate Division of the Supreme Court, Fourth Judicial Department, which entered an order in accordance with the Court of Appeals memorandum affirming the conviction, on April 3, 1981. As the Appellate Division order was entered on review of the facts alone, under state law no further appeal to the Court of Appeals was possible, and therefore the order of the Appellate Division rendered final the judgment of the Court of Appeals, of which review is here sought. This Court has jurisdiction under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Petitioner was arrested on April 15, 1977 in Rochester, New York, on charges of sale and possession of a controlled substance. On December 12, 1977 he moved for dismissal of the indictments under the state speedy trial statute, Criminal Procedure Law §30.30 (printed as Appendix D) which requires the prosecution to be ready for trial within six months of the commencement of the action, allowing for the exclusion of time periods of a specified nature. This speedy trial motion was denied. The indictment charged criminal sale of a controlled substance, first degree, N.Y. Penal Law §220.43(1), an "A-1" felony for which a mandatory life term and a mandatory minimum term of at least 15 years are provided. On September 28, 1978 Petitioner accepted the offer by the District Attorney to plead to a charge of criminal sale of a controlled substance, second degree, N.Y. Penal Law §220.41. This charge also carried a mandatory life term, and a mandatory minimum of at least six years.[1]

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[1]Under present law a minimum term of three years may be imposed. N.Y. Penal Law §70.01(3)(a)(ii).

At the time he entered his plea, Petitioner signed a stipulation enumerating the rights lost upon his plea: the speedy trial right was not mentioned (Appendix E).

On October 30, 1978, in Monroe County, Petitioner was sentenced to the minimum allowable term of six years to life. On the same date he filed a notice of appeal.

The only issue raised on appeal was whether the speedy trial motion was properly denied. The New York Court of Appeals had consistently recognized the conditional[2] nature of a plea of guilt following a denial of a statutory speedy trial claim. *People v. Blakley*, 34 N.Y.2d 311 (1974); *People v. Wallace*, 26 N.Y.2d 371 (1970); *People v. Masselli*, 13 N.Y.2d 1 (1963). These cases were decided under the statute which preceded the adoption of Criminal Procedure Law (CPL) §30.30. The first two were decided pursuant to the former Code of Criminal Procedure §668, and *Masselli* involved §669-a.[3]

After the adoption of CPL §30.30 the Court of Appeals continued to review statutory speedy trial claims notwithstanding that the conviction rested on a guilty plea. *People v. Goodman*, 41 N.Y.2d 888 (1977); *People v. Lomax*, 50 N.Y.2d 351 (1980); *People v. Brothers*, 50 N.Y.2d 413 (1980).

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[2]A conditional plea of guilty is one which does not foreclose certain issues from direct review. Note, *Conditional Guilty Pleas*, 93 Harv.L.R. 564; Comment, *Conditioned Guilty Pleas: Post Guilty Plea Appeal of Nonjurisdictional Issues*, 26 UCLA L.R. 360 (1971).

[3]CCP §668 provided:

> If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the Court in which the indictment is triable, after it is found the Court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

CCP §669-a provided that a prisoner serving a sentence and facing charges pending elsewhere in the state must be brought to trial within 180 days following his request.

In each of the four Judicial Departments, during the relevant time period, the Appellate Division of the Supreme Court recognized the appealability of statutory speedy trial claims by defendants who had pled guilty. E.g. *People v. Partman*, 70 A.D.2d 814 (1st Dept. 1979); *People v. Glade*, 75 A.D.2d 860 (2nd Dept. 1980); *People v. Goodman*, 46 A.D.2d 938 (3rd Dept. 1974); *People v. Williams*, 72 A.D.2d 950 (4th Dept. 1979).

Upon review of Petitioner's speedy trial claim, the Appellate Division reversed the conviction and ordered the indictment dismissed, on April 8, 1980. On May 15, 1980, the People sought leave to appeal, which was granted.

In its two decisions dated May 19, 1980, *People v. Lomax*, *People v. Brothers*, *supra*, the Court of Appeals, although reviewing the statutory speedy trial claims made, suggested for the first time that

> it may be that a subsequent plea of guilty, even if conditionally expressed (short possibly of a court sanctioned agreement for preservation), should be held to have operated as a waiver of the statutory entitlement to dismissal (50 N.Y.2d at 418).

The Court noted that

> [t]he People have not asked this Court to consider the possibility that defendant's guilty plea constituted a waiver of any right he may have had to have the charges against him dismissed pursuant to CPL 30.30. . . . Hence, we have no occasion to address the question in the instant appeal, and our discussion in this case should in no way be construed as a tacit rejection of this possibility. (50 N.Y.2d at 354 n.1)

On October 16, 1980, the Court of Appeals decided *People v. Friscia*, 51 N.Y.2d 845, and stated that the defendant's plea of guilty "operated as a waiver of his statutory right to any

dismissal" pursuant to CPL §30.30, citing its decision in *Brothers*.[4]

After the decision in *Friscia* the People filed their brief in Petitioner's case in the New York Court of Appeals. The People argued the merits of the speedy trial issue, but also raised for the first time the claim that Petitioner's plea operated as a waiver.

Petitioner's brief to the Court of Appeals raised the federal claims urged herein. Petitioner argued that the retrospective application of the rule in *People v. Friscia* to his plea entered two years previous, sought by the People, would violate his right to due process of law owing to the *ex post facto* nature of the change in the rule which prevailed at the time of his plea.

Petitioner also argued that defendants after the decisions in *People v. Friscia* and *People v. Brothers* would have the opportunity to enter into a "court sanctioned agreement for preservation" of their statutory speedy trial claims; otherwise they would have the opportunity to choose to go to trial in order to preserve their right to appeal. Petitioner warned that an adverse decision by the Court of Appeals which would unreasonably deprive him of these opportunities would violate his right to equal protection of the law.

Yet, the Court of Appeals reversed the Appellate Division on the sole ground that, by pleading guilty, Petitioner had waived his right to assert his speedy trial claim on appeal. The court expressly rejected Petitioner's due process claim. The Court merely reinstated the conviction without providing Petitioner

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[4]The People, in *Friscia*, also did not raise the question of waiver; nevertheless the Court of Appeals finally reached this issue. Its determination of the point was not necessary to the decision, since it also affirmed the decision of the Appellate Division of the merits.

the opportunity to renegotiate his plea or elect to stand trial. (52 N.Y.2d 1020.)

The case was remitted to the Appellate Division for proceedings in accordance with the Court of Appeals memorandum. The Appellate Division entered the appropriate order (Appendix B).

When Petitioner's conviction was reversed by the Appellate Division, he was released from the Attica Correctional Facility. He remains free now on bail, pending the determination of this Court, by order of the Hon. Matthew J. Jasen, Associate Judge of the New York Court of Appeals. (Appendix F).

REASONS FOR GRANTING THE WRIT

When Petitioner pled guilty, he understood that if his appeal were unsuccessful he would have to serve the life imprisonment sentence imposed. He did not assume the risk that two years later, after winning his appeal and release from prison, the Court of Appeals would overrule the law which allowed such appeals following guilty pleas and apply it retrospectively to himself; nor could Petitioner have assumed the risk that, if such a rule were applied *ex post facto* to himself, he would be left without alternatives freely open to others, absolutely deprived of the appellate review to which he once was entitled, and required to return to his term of life imprisonment.

By issuance of the writ sought, Petitioner (and a substantial number of others are similarly situated) seeks the fundamental fairness, guaranteed to him by the Due Process and Equal Protection clauses of the Fourteenth Amendment, of which he has been deprived.

1. **Retroactive application to Petitioner of the new rule announced in *People v. Friscia* violates the right to Due Process.**

Although the ban on *ex post facto* laws contained in Article 1 of the United States Constitution does not apply directly to judicial determinations, the principle upon which it is based is fundamental to our concept of constitutional liberty, enforced under the Due Process clause of the Fourteenth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990 (1977).

The critical question in *ex post facto* analysis under the Due Process Clause must be whether the judicial ruling "changes the legal consequences of acts completed before the effective date." *Weaver v. Graham*, ____, U.S. ____, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Proscribed is any rule which "in relation to the offense or its consequences, alters the situation of a party to his disadvantage." *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 449, 27 L.Ed. 506 (1883). Although the traditional *ex post facto* analysis applies to judicial rulings which expand the scope of a criminal statute, e.g. *Marks v. United States*, 97 S.Ct. 990, 430 U.S. 188 (1977), or change the punishment imposed, *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797 (1937), changes in the law which may be characterized as "procedural" may affect a defendant in such a harsh and arbitrary manner as to fall within the constitutional prohibition, *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68 (1925), especially where "any substantial right which the law gave the defendant at the time to which his guilt relates be taken away . . . ." *Kring v. Missouri*, 107 U.S. at 232, 2 S.Ct. at 452.

At the time of his plea, Petitioner not only had the right to dismissal under the state speedy trial statute, but also the right to appellate review of his claim even though he had pled guilty. This was recognized by the Appellate Division when it first reversed the conviction, but also in the cases cited at p. 3-4, *ante*.

Indeed, in 1974 the Court of Appeals held that waiver of a claim for dismissal pursuant to the speedy trial statute could not be made a condition precedent to the offer of a reduced plea, and the defendant in that case was allowed to appeal notwithstanding the entry of plea on such a condition. *People v. Blakley*, 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974).

Petitioner's reliance on these rights is evidenced by his immediate appeal from his conviction on the sole ground of the denial of his state speedy trial claim, and his election to plead guilty to the reduced charge without making part of the record the understanding of all parties at the time that his right to appeal was preserved.

The silence of the written stipulation and waiver entered into at the time of the plea concerning the right to appeal, and the failure of the People to raise the issue of waiver before the Appellate Division, are demonstrative of the People's similar understanding of the applicable law at the time of the plea

When the Court of Appeals reversed the Appellate Division and reinstated the conviction, it retroactively took away Petitioner's right to dismissal of the indictment which, according to the Appellate Division, the Trial Court ought to have upheld when the motion was first made.[5] Although, at the time, Petitioner's remedy was to appeal the decision of the trial judge, that right also has been taken away *ex post facto*. Without warning, Petitioner has been absolutely deprived of his right to direct appellate review.

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive

[5]The Appellate Division determination on the merits was not disturbed by the Court of Appeals.

right." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453 (1930). (*Bouie v. City of Columbia*, 378 U.S. at 354, 84 S.Ct. at 1703)

An analogous result achieved by the same means in a civil case would equally be violative of the right to due process. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra; DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2nd Cir. 1975). The highest courts in other states have given only prospective effect to those decisions overruling prior cases and practices to the disadvantage of the accused. *Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 18 So. 251 (1944); *Hunter v. Cleveland*, 202 Ind. 328, 174 NE 287 (1930); *Commonwealth v. Lewis*, ___ Mass. ___, 409 N.E.2d 771 (1980); *State v. Longino*, 109 Miss. 125, 67 So. 902; *State v. Simanton*, 100 Mont. 292, 49 P.2d 981; *State v. Jones*, 44 N.M. 623, 107 P.2d 324 (1940); *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973); *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904). See also, *United States v. Fimmano*, 8 M.J. 197 (1980).

Petitioner is not alone in his plight, for there are numerous others whose pleas were entered prior to October of 1980 in reliance on the prior law. Several, like Petitioner, have already had the rule in *Friscia* applied retroactively to them to their extreme disadvantage.[6]

Note the absence of interest on the part of the state in having the new rule applied retroactively. The People had no expectation of finality in the plea under the law in effect at the time. When the conviction was reversed by the Appellate Division, the State was in no worse position, with respect to its ability to obtain a valid conviction, than it would have been had the trial court properly granted the motion or had the defendant stood trial and only then won reversal on appeal. Cf. *Westen*,

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[6]Cf. *People v. Niess*, ___ A.D.2d ___, 437 N.Y.S.2d 460 (2nd Dept. 1981), *People v. Scott*, 79 A.D.2d 885, ___ N.Y.S.2d ___ (1980); *People v. Nelson*, ___ A.D.2d ___, 435 N.Y.S.2d 836 (4th Dept. 1981); *People v. Clary*, 52 N.Y.2d 1023 (1981) (co-defendant of Petitioner).

Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L.R. 1214, 1235 (1977).

On the other hand, the reinstatement of the conviction leaves the State quite unexpectedly in a far superior position than they enjoyed prior to the entry of the plea. With the help of the Court of Appeals, the People have avoided the needless expense of a trial which could have occurred had the Petitioner been aware of the new rule before his plea. The People have escaped the appellate review they once fully expected, and with knowledge now that reversal on the merits would be certain.

For Petitioner the result is equally unexpected, but disastrous. Although he has a valid claim for reversal of his conviction, his right to raise that claim on appeal following his plea of guilty has been taken away *ex post facto*. His right of access to appellate review by other means has been barred for his failure to comply with a rule of which he could not have been aware two years before the rule was announced.

The arbitrariness and injustice of this result strike at the heart of the notion of due process of law.

2. The action of the New York Court of Appeals deprives Petitioner of equal protection of the laws.

Although the State of New York may not be constitutionally compelled to provide appellate review, it may not accord such review to some while depriving others for no good reason. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956). This is what has happened to Petitioner.

Defendants, under the new rule in New York State, confronted with negotiated plea opportunities following improper denial of their statutory speedy trial motions will have three possible choices: (1) plead guilty and lose the right to raise the speedy trial claim on appeal, or (2) bargain, at whatever cost, for a

"court sanctioned agreement for preservation" of the right to appeal, or (3) stand trial, then appeal. However, under the ruling of the Court of Appeals, Petitioner is to return to prison to serve the remainder of his sentence of life imprisonment. He is given neither the opportunity to negotiate for a "court sanctioned" agreement, nor to go to trial — now the conditions precedent to appellate review. Petitioner is treated as though he had been aware of the new rule in *Friscia* and pled guilty nonetheless.

Put another way, the Court of Appeals has given retroactive application to Petitioner only that part of the new rule which deems a guilty plea as a waiver of the right to appeal. The second and third choices — available for post-*Friscia* defendants — are not offered to Petitioner.[7]

The State can articulate no rational basis for this inequitable treatment of Petitioner, and those similarly situated. The special disadvantage accorded him compounds the arbitrariness of the ruling in this case, and cannot be tolerated if the laws are to protect all citizens equally.

CONCLUSION

The question of retroactivity has often been considered with respect to judicial opinions expanding the rights of the accused, and the extension backward in time of the benefits of these decisions. Judicial decisions *contracting* rights previously enjoyed by defendants have been less common. It is important to define the constitutional limitations controlling the extent to

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[7]While Petitioner and others suffer more harshly than those who have actual notice of the rule, others similarly situated have escaped the treatment accorded Petitioner merely because the People failed to seek higher review of a successful appeal, cf. *People v. Colon*, ___ A.D.2d ___, 429 N.Y.S.2d 432 (1st Dept., June 1980), or the Appellate Division ignored *Friscia* or refused to apply it retrospectively. *People v. Lopez*, 77 A.D.2d 287, 433 N.Y.S.2d 569 (1st Dept., Nov. 1980).

which such decisions might act adversely and inequitably with respect to persons who have acted in reasonable reliance on the prior law.

These constitutional questions are presented by this case with unusual clarity; for Petitioner the consequences are most grave. Under the law upon which he relied at the time of his plea, Petitioner had the right to a dismissal of the indictment, wrongfully denied by the trial judge, and the right to appeal in order to obtain that dismissal.

But, having adopted a new rule, and applied it retrospectively and inequitably to Petitioner, the Court of Appeals has taken away the rights upon which he was once entitled to rely. It is not merely the magnitude of injury which this result does to the concepts of due process and equal protection of the law, but the imbalance between the absence of state interest or justification in the result achieved and the term of life imprisonment which the Petitioner must otherwise recommence to serve, which warrant this Court's review.

Respectfully submitted,

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May 26, 1981

APPENDICES

APPENDIX A
Memorandum of the Court of Appeals, February 24, 1981
STATE OF NEW YORK — COURT OF APPEALS

4 No. 95

THE PEOPLE &c.,

Appellant,

vs.

EDWARD THILL,

Respondent.

(95) Lawrence T. Kurlander, DA, Monroe County (David L. Pogue of counsel) for appellant.

Mark J. Mahoney, Buffalo, for respondent.

MEMORANDUM

The order of the Appellate Division should be reversed and the case remitted to that court for a review of the facts.

By pleading guilty, defendant waived his statutory right to assert that he was entitled to dismissal because the People were not ready for trial within the time required by CPL 30.30. (See *People* v *Clary*, ____NY2d____ [decided herewith]; *People* v *Friscia*, 51 NY2d 845.) He cannot, therefore, test the validity of that claim on appeal.

We reject defendant's argument that the due process clauses of the Federal and State Constitutions require a contrary conclusion.

• • • • •

Order reversed and case remitted to the Appellate Division, Fourth Department, for further proceedings in accordance with the memorandum herein. All concur.

Decided February 24, 1981

APPENDIX B
Order of the Appellate Division,
April 3, 1981

112/80

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL
DEPARTMENT

PRESENT: CARDAMONE, J.P., HANCOCK, DOERR, MOULE, SCHNEPP, JJ.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

EDWARD THILL,

Appellant.

The above named Edward Thill having appealed to this court from a judgment of conviction of the Supreme Court, Monroe County, entered October 30, 1978 and this court having on April 8, 1980 entered an order reversing the judgment and dismissing the indictment and the People of the State of New York having appealed to the Court of Appeals from the order of this court, and the Court of Appeals having on February 24, 1981 reversed the order and remitted the case to this court for a review of the facts,

Now, upon reading the remittitur of the Court of Appeals and having reviewed the facts and found no error therein,

It is hereby ORDERED, That the judgment be and the same hereby is unanimously affirmed.

Entered: April 3, 1981

MARY F. ZOLLER, *Clerk*

APPENDIX C
Memorandum of Appellate Division, April 8, 1980, 75 AD2d 709

4 The People of the State of New York, Respondent, v Edward Thill, Appellant. — Judgment reversed, on the law, and indictment dismissed. Memorandum: On April 15, 1977 defendant was arrested, along with two other persons, on felony charges of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the fifth degree. After assignment of counsel, a preliminary hearing was held on April 20, 1977 at which time he was held for the Grand Jury. On October 11, 1977 the case was presented to the Grand Jury which handed up an indictment on October 14, 1977. Arraignment was scheduled for October 20, 1977 but was adjourned to October 24, 1977 at the request of defendant's counsel. Defendant was granted an adjournment for the purpose of making motions. On November 14, 1977 motions were heard and the People agreed to furnish defendant with certain material requested including Grand Jury testimony of a codefendant. On December 5, 1977, the requested material not having been furnished, the defendant's attorney appeared in court with the District Attorney and the court was assured the material would be furnished to defendant. On this date the court placed the case on the Trial Calendar. Prior to this date and even on December 5, 1977 nowhere in the record does it appear that the People announced their readiness for trial nor did they move the case for trial. On December 12, 1977 the defendant made a motion to dismiss the indictment for failure to prosecute in a timely fashion (CPL 30.30). After hearing arguments the court denied the motion and again directed the District Attorney to provide the still missing material to defendant. After going to the District Attorney's office to obtain this material, counsel for defendant and the District Attorney returned to the court to explain that certain material was nonexistent and that the Grand Jury testimony had not been transcribed. At this point the following colloquy

took place: "The Court: So the prosecution is not now ready for trial and has not been ready? Mr. Valentino [Assistant District Attorney]: I guess you have to say that, your Honor, because we don't have the Grand Jury minutes." The court thereupon set aside its denial of the defendant's motion and ordered a hearing on why the People were not prepared for trial. The court also struck the case from the Trial Calendar. The motion to dismiss for failure to prosecute in a timely fashion was argued February 21, 1978 before another Judge (the parties agreed that no material fact was in dispute and a hearing was not necessary) *People v Gruden*, 42 NY2d 214). The court found that the People were ready for trial by the "middle of December, 1977, approximately eight months after the commencement of the action." In computing time periods for which the prosecution was not chargeable for delay, the court excluded a two-month, one-week period from April 20, 1977 when defendant was held for the Grand Jury to June 27, 1977 when defendant retained the last of three attorneys (the People concede that from June 28, 1977 to Oct. 10, 1977, the delay is unexplainable) for the reason that during this period the defendant discharged two assigned counsel and retained his present attorney and further that certain plea negotiations were taking place between the first two attorneys and the District Attorney and the defendant's father and the District Attorney. In this the court erred. The unexplained period should extend to October 20, 1977, when defendant's arraignment was scheduled, a period of three months, three weeks. Defendant has the burden to establish that he was denied a speedy trial (CPL 210.45, subd 7; *People v Del Valle*, 63 AD2d 830) but having made a prima facie showing of undue delay, the District Attorney must come forward with an explanation of why he is not chargeable with a delay in excess of six months (CPL 30.30, subd 4; *People v Sturgis*, 38 NY2d 625).

APPENDIX C
Memorandum of Appellate Division, April 8, 1980, 75 AD2d 709

For preindictment delay to be chargeable to defendant it must be shown that the delay was attributable to defendant, that the indictment was impeded or prevented by defendant's actions *(People v Sturgis, supra).* Here there has been no showing that the change of attorneys or plea negotiations had anything to do with the delay in presenting the case to the Grand Jury, and defendant denies making any request for a delay, an allegation not disproved by the District Attorney. Indeed, during this preindictment period the matter is wholly under the control of the People and there is nothing the defendant can do to prevent or delay the presentment of the case to the Grand Jury. Adjournments, motions, and the like generally are not available to defendant at this stage. The District Attorney is, therefore, chargeable with the delay from April 20, 1977 when defendant was held for the Grand Jury until the date of his scheduled arraignment, October 20, 1977 *(People v Robinson,* 73 AD2d 809; *People v Rivera,* 72 AD2d 922). The court also excluded from the time chargeable to the People the period from October 24, 1977 (the defendant's arraignment) to December 12, 1977 (the date the court found that the People were ready for trial) because this period relates to motions made by defendant and was a period of delay requested by him. While requests for time to make motions were made during some of this period, it is not clear that all of this period is properly chargeable to defendant, although the period from October 20, 1977 to December 5, 1977, when defendant's first motions were heard, is properly chargeable to him. Nowhere in the record does it appear that during this postindictment period the People ever announced their readiness for trial to the court. The burden of demonstrating readiness for trial is on the People where more than six months have passed from the commencement of the criminal proceeding *(People v Robinson, supra)* and the People must

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communicate readiness for trial to the court on the record when ready to proceed *(People v Hamilton,* 46 NY2d 932). It is insufficient as a matter of law to inform the court of such a claim for the first time in an affidavit or on oral argument in response to a motion to dismiss the indictment. The right to a speedy trial under CPL 30.30 relates to prosecutorial readiness and is not dependent in any way on whether defendant has expressed his readiness for trial or whether defendant has been prejudiced by delay *(People v Hamilton, supra).* Although defendant did request various adjournments to make postindictment motions, the fact of the matter is that after arraignment the People failed to announce their readiness for trial and indeed they could not have made such representation. On December 12, 1977 they were not and had not been ready for trial and the court found that the People were not ready for trial until "the middle of December, 1977." In summary, the period from April 20, 1977 to October 20, 1977, a period of delay not sufficiently explained, is chargeable to the People. This period encompasses six months. Assuming that arguably some period of time thereafter might be chargeable to defendant for motions, the case was not placed on the Trial Calendar until December 5, 1977, and that was done by the court, *sua sponte,* only to be removed from the calendar on December 12, 1977 upon the People's admission that they were not ready for trial. In any event more than six months had expired since the commencement of the criminal proceeding and defendant's conviction must be reversed and the indictment dismissed. All concur, except Hancock, Jr., J., dissents and votes to affirm the judgment, in the following memorandum.

Hancock, Jr., J. (dissenting). Defendant's motion for dismissal of the indictment pursuant to CPL 30.30 was properly denied for the reasons stated by the trial court in its memorandum.

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Defendant was arrested on April 15, 1977. Informations charging him with attempted first degree criminal sale of a controlled substance and criminal possession of a controlled substance in the fifth degree were filed on April 16, 1977. On the same date, at his arraignment, defendant and the two codefendants were represented by the Monroe County Public Defender who entered pleas of not guilty and requested an adjournment to April 18 so that private counsel could be assigned to defendant and one of the codefendants. On April 18, 1977 defendant was assigned his first private counsel, Mr. Saporito, who requested a preliminary hearing which was held on April 20, 1977 and which resulted in defendant's being bound over for the Grand Jury. Between April 20, 1977 and June 27, 1977, defendant discharged two attorneys, Mr. Saporito and Mr. Crimi. He notified the People of the retention of his present counsel on June 27. Also during this period of time defendant's first two attorneys and his father initiated and pursued plea negotiations with the District Attorney's office. The negotiations were discontinued by defendant's present attorney. Defendant's case was presented to the Grand Jury on October 11 and 12, 1977 and indictments against him and the codefendants were returned on October 14. On October 14, the Monroe County Clerk's office, pursuant to its "usual practice," mailed notice of his arraignment on October 20, 1977 to defendant who lived out of town. Defense counsel requested and was granted a four-day continuance to October 24, 1977 for the arraignment. From October 24, 1977 to December 14, 1977, the date the trial court found that the People were ready for trial, various defense motions were pending and continuances were granted in connection therewith at the request or with the consent of defense counsel. In my opinion, 105 days — the period from June 27, 1977 to October 10, 1977, are chargeable to the People who concede

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their responsibility for this preindictment delay. I do not agree with the majority, however, that the 68 days from April 20, 1977 to June 27, 1977, in which plea negotiations took place between the District Attorney's office and defense counsel and defendant's father, are also chargeable to them. The People allege (and the defendant does not deny) that defendant's first two counsel actively participated in the plea negotiations with the District Attorney's office and that "the defendant's father, during the time and for some time later, repeatedly telephoned [the Assistant District Attorney] for the purpose of offering the cooperation of his son with the Rochester Police." In its memorandum decision Trial Term found: "Because a substantial period of delay in the presentation of the cases to the Grand Jury resulted from the plea negotiations between the district attorney's office and defendant, that period from April 20, 1977 to at least June 27, 1977 is not chargeable to the People. * * * Furthermore, while defendant did not actually request delay or prevent the presentation of the cases to the Grand Jury, the initial delay in presentation resulted from the negotiations which he and his father initiated. Nor is there any distinction between preindictment and postindictment delay resulting from negotiations and substitution of counsel as long as the delay 'results therefrom' *(People v Sturgis,* 38 NY2d [625,] at 628, *supra).*" Trial Term's holding is supported by *People v Panarella* (50 AD2d 304, 306) where the court noted that to charge the People with preindictment delay caused by plea negotiations initiated and approved by the defense would lend encouragement to a practice "whereby the defense may actively participate in the preindictment delay by express acquiescence and urgings and thereby secure the dismissal of an indictment." *(People v Panarella, supra,* p 306.) *People v Rivera* (72 AD2d 922), cited by the majority is distinguishable. In *Rivera* there was no showing,

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as there is here, that the defendant initiated the plea negotiations, that the defendant's family made numerous offers of co-operation with the police in exchange for favorable treatment, and that during the same time period the defendant changed counsel upon two occasions. In my opinion the record is sufficient to support the court's determination that the pre-indictment delay from April 20 to June 27 resulted from these factors (see *People v Sturyis*, 38 NY2d 625). The majority, however, reach the opposite conclusion. The record contains no opposing affidavit from defendant, his father, Mr. Saporito, or Mr. Crimi or anyone having direct knowledge of the facts. Nothing was produced by defendant contrary to the People's affidavits or to the court's finding that the negotiations resulted in the delay except a letter from defendant's present attorney, who had no personal knowledge of the circumstances, containing arguments, on the law, and as to conclusions to be drawn from the affidavits. Without further proof either at a hearing or in additional affidavits I see no basis in the record to support a finding contrary to that reached by the trial court. But even if we charge the People with the entire 68-day period from April 20 to June 27 (ignoring the fact that some portion of the delay would properly have been assessed against defendant under CPL 30.30 [subd 4, par (f)] because of the defendant's dismissal and retention of two attorneys) the total period of delay attributable to the People would be 173 days — a period within the six-month rule (see CPL 30.30, subd 1, par [a]). The four-day period from April 16, 1977 until the preliminary hearing on April 20, 1977 is excludable under CPL 30.30 (subd 4, pars [a], [b], [f]). The six-day period from October 14, 1977 to October 20, 1977 should not be charged to the People because it was delay caused by the "usual practice" of the County Clerk's office in giving out-of-town defendants time in which to appear for their arraignment

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and for the defendants' benefit (cf. *People ex rel. Franklin v Warden, Brooklyn House of Detention for Men*, 31 NY2d 498). The four-day period from October 20, 1977 to October 24, 1977 — a continuance requested by defense counsel — is clearly chargeable to the defendant (CPL 30.30, subd 4, par [b]). The remaining 65-day period from October 24, 1977 to December 14, 1977 is also excludable because of pending motions under CPL 30.30 (subd 4, pars [a], [b]). The language of CPL 30.30 is unambiguous. It requires the People to be ready within six months of the commencement of the action and that "In computing the time within which the people must be ready for trial" certain periods specified in subdivision 4 "must be excluded" (CPL 30.30, subd 4). Trial Term correctly found that the People met the statutory requirement (see, generally, 3 Zett, New York Criminal Practice, pars 23.4, 23.5). (Appeal from judgment of Monroe Supreme Court — criminal sale controlled substance, second degree.) Present — Cardamone, J.P., Hancock, Jr., Schnepp, Doerr and Moule, JJ.

APPENDIX D
New York Criminal Procedure Law
§30.30 (in part)

*§ 30.30 Speedy trial; time limitations.

1. Except as otherwise provided in subdivision three, a motion made pursuant the paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:

(a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;

• • •

4. In computing the time within which the people must be ready for trial pursuant to subdivisions one and two, the following periods must be excluded:

(a) a reasonable period of delay resulting from other proceedings concerning the defendent, including but not limited to proceedings for the determination of competency and the period during which defendant is incompetent to stand trial; demand to produce; pre-trial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court; or

(b) the period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his counsel. The court must grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges. A defendant without counsel must be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent; or

APPENDIX D
New York Criminal Procedure Law
§30.30 (in part)

(c) the period of delay resulting from the absence or unavailability of the defendant. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or

(d) a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial pursuant to this section has not run and good cause is not shown for granting severance; or

(e) the period of delay resulting from detention of the defendant in another jurisdiction provided the district attorney is aware of such detention and has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial; or

(f) the period during which the defendant is without counsel through no fault of the court; except when the defendant is proceeding as his own attorney with the permission of the court; or

(g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney if (i) the continuance is granted because of the unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or (ii) the continuance is granted to allow the district attorney additional time to prepare the people's case and additional time is justified by the exceptional circumstances of the case.

• • •

APPENDIX E
Stipulation on Entry of Plea,
September 28, 1978

STATE OF NEW YORK
SUPREME COURT – COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

EDWARD THILL

Defendant.

Indictment No. 1138
Indictment No. 1139

IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES THAT:

1. The defendant will enter a plea of guilty to the crime of Criminal Sale of a Controlled Substance, Second Degree, an A-2 felony;

2. The People will move the Court to receive this plea in full satisfaction of Indictment No. 1138 and No. 1139.

3. The defendant will be sentenced to a term of imprisonment in the State Prison from 6 years to life.

The defendant, Edward Thill, further indicates by affixing his/her signature to this Stipulation that he understands and hereby surrenders and waives the following rights:

1) The right to a trial, either by the Court or by a jury;

2) The right to confront and cross-examine witnesses called by the People;

3) The right to call witnesses on his own behalf;

4) The right to testify on his own behalf, understanding that he could not be compelled to testify if he did not want to testify.

APPENDIX E
Stipulation on Entry of Plea,
September 28, 1978

The defendant further indicates his understanding that the People have the obligation of convincing the trier of facts, whether Judge or Jury, by proof beyond a reasonable doubt, that the charges set forth in the indictment/information are true. The defendant understands that by pleading guilty as set forth herein, he is relieving the People of this obligation and admits to the Court that he is guilty of the offense to which he is pleading guilty.

The defendant further understands that if, after receipt of the presentence report, the Court is unable to accept the terms of this Stipulation as an acceptable disposition of this matter, the defendant will be given the opportunity to withdraw his guilty plea and proceed to trial.

Finally, the defendant acknowledges that this Stipulation is being entered into freely and voluntarily and upon the advice and concurrence of counsel, and that the terms of this agreement are not the product of any threats, or any promises other than those set forth herein.

Dated: September 28, 1978.

/s/ EDWARD J. THILL
Defendant

/s/ MICHAEL J. BROWN
Attorney for Defendant

/s/ J. CHAMBERLAIN
Assistant District Attorney

THIS STIPULATION IS HEREBY APPROVED:

/s/ JAMES H. BOOMER
Supreme Court Justice

APPENDIX F
Court of Appeals Order Granting Stay and Release on Bail, Jasen, J., April 10, 1981

STATE OF NEW YORK
COURT OF APPEALS
BEFORE: HON. MATTHEW J. JASEN, *Associate Judge*

PEOPLE OF THE STATE OF NEW YORK,

Appellant

-vs-

EDWARD THILL,

Respondent

No. 95
February 24, 1981

On consideration of respondent EDWARD THILL'S motion for an order staying the execution and enforcement of the judgment of this court, dated February 24, 1981, and that of the Appellate Division, Fourth Judicial Department, entered on April 3, 1981 herein, pending an application to the Supreme Court of the United States for a writ of certiorari, it is hereby

ORDERED, that the motion be granted, and that the execution and enforcement of the said judgments in this case be, and the same are hereby stayed on the condition that the petition for certiorari be submitted to the Supreme Court of the United States on or before June 2, 1981, and on the further condition that the respondent, EDWARD THILL, assign cash bail in the sum of $5,000.00 to be held by the Clerk of the Erie County Supreme Court in the form he shall prescribe, in favor of respondent, until further order of this court, and it is further

APPENDIX F

Court of Appeals Order Granting Stay and Release on Bail, Jasen, J., April 10, 1981

ORDERED, that if there is filed with the Clerk of this Court, a notice from the Clerk of the Supreme Court of the United States that respondent, EDWARD THILL has filed a petition for writ of certiorari in the Supreme Court during the period of stay, the stay herein granted shall continue until final disposition by the United States Supreme Court.

DATED: Buffalo, New York
April 10, 1981

/s/ MATTHEW J. JASEN
Associate Judge

Let service of a copy of this order be made on Donald O. Chesworth, Jr., District Attorney on or before April 13, 1981 and the original order be filed, with proof of service, immediately after service, in the office of the Clerk of the Court at Albany, by certified mail, return receipt requested.

No. 80-2018

Office-Supreme Court, U
FILED
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ALEXANDER L. STEVA
CLERK

In The

Supreme Court of the United States

October Term, 1980

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Melvin Bressler, Esq.
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Question Presented

Petitioner suggests, at page *i* of the Petition, that two questions are presented for the Court's consideration. We urge that neither question postulated by petitioner is presented by the proceedings in the State courts, and the threshold question must be:

Did the New York Court of Appeals create new law by its decision in *People v. Friscia** and if so, were any of petitioner's rights affected thereby?

*51 N.Y.2d 845; 433 N.Y.S.2d 754 (1980).

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In The

Supreme Court of the United States

October Term, 1980

No. 80-2018

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Statement of the Case

Petitioner was charged with felony drug sale in Monroe County, New York. Before trial, he made a motion to dismiss the indictment because, he alleged, the prosecution had violated New York's "ready trial" rule as found in New York Criminal Procedure Law §30.30 by not preparing the case for trial within six months of his arrest. The trial court denied the motion after making the computations of the applicable time periods. Petitioner then negotiated a reduced plea and was sentenced accordingly.

On appeal, the intermediate appellate court, the appellate division of supreme court, disagreed with the trial court's computations and concluded that the prosecution had not been

ready within six months of the commencement of the action. They reversed the conviction.

The People then appealed to the Court of Appeals, arguing for the first time that by pleading guilty, petitioner had waived his statutory claim under C.P.L. §30.30. The court agreed and reinstated the conviction (the opinion of each court is reproduced in the Appendix to the Petition).

ARGUMENT

No due process or other Constitutional issue is presented by the actions of the State courts.

Petitioner claims his due process rights under the 14th Amendment were violated because New York's highest Court retroactively imposed a new, Court-made law on him to his detriment.

His claim is based on the supposed difference between the decision of the New York Court of Appeals in *People v. Blakely*, 34 N.Y.2d 311, 357 N.Y.S.2d 459, decided in 1974, and its decision in *People v. Friscia*, 51 N.Y.2d 845, 433 N.Y.S.2d 754, decided in 1980. According to petitioner's analysis, the court in *Blakely* said that speedy trial claims could not be waived by a plea of guilty, and in *Friscia* it said that a plea of guilty automatically waives a speedy trial claim.

We believe the two cases deal with different statutes and different legal principles. There was, therefore, no "new law" created by the decision in *Friscia*, and no due process claim is implicated.

New York's Constitution has no provision dealing with a defendant's right to a speedy trial; those rights were protected by statute, formerly in the Code of Criminal Procedure (C.C.P.) §§ 8 and 668, and presently in the Criminal Procedure Law, article 30.

The Criminal Procedure Law (C.P.L.) was enacted in 1970 to replace the Code of Criminal Procedure, to be effective on September 1, 1971 (Laws of 1970, ch. 996).

When the C.P.L. was first enacted, a defendant's speedy trial rights formerly in §§ 8 and 668 of the repealed C.C.P. were provided for in C.P.L. §30.20. At that time there was a §30.30, but it dealt with trial preferences, not speedy trial rights and, as we shall show, was renumbered before it ever took effect.

After the C.P.L. was enacted, but before its effective date, the State's Judicial Conference, an arm of the Courts, acting through its Administrative Board, enacted certain regulations which required that all defendents be brought to trial within a specified period of time. In the case of most felonies, for example, the absolute time limitation was six months. A defendant not brought to trial within the prescribed period was to be released, and the indictment (or other accusatory instrument) would be dismissed.

Before the effective date of these regulations, the legislature enacted the present C.P.L. §30.30, and relocated the subject matter of the former §30.30 to a new subparagraph of §30.20 (Laws of 1972, ch. 184).

The present §30.30, although captioned "Speedy trial; time limitations", is really a ready trial rule. See *People ex rel. Franklin v. Warden,* 31 N.Y.2d 498, at 500, 341 N.Y.S.2d at 605 (1973). Pursuant to §30.30, the prosecutor must prepare his case and announce his readiness for trial within a set time limit. In felony cases, except murder, prosecutors must be ready for trial within six months of the commencement of the criminal action. However, certain periods can be excluded in computing the six-month limitation pursuant to §30.30 subparagraph 4. In this case, the trial judge found that the applicable elapsed time less the excludable period was less than six months, and that therefore the motion to dismiss the indictment must be denied.

The petitioner then pled to a reduced charge,* and on his appeal, the appellate division of supreme court reversed, concluding that the trial judge's computation of the excludable periods was incorrect, and that the prosecution was not ready for trial within six months.

After the appellate division decision, but before a further appeal, the State's highest court, the Court of Appeals, decided *People v. Brothers,* 50 N.Y.2d 413, 429 N.Y.S.2d 558 (1980), in which it strongly hinted that a guilty plea operated as a waiver of §30.30 claims (discussion 50 N.Y.2d at 418). The decision in *People v. Friscia,* 51 N.Y.2d 845, 433 N.Y.S.2d 754 (1980) shortly followed. There, the court specifically held that: ". . . his [i.e., defendant's] plea of guilty operated as a waiver of his statutory right to any dismissal." The court then discussed Friscia's speedy trial claim under C.P.L. §30.20, clearly indicating that such claims were not waived by a plea of guilty. Since §30.20 is the present embodiment of the speedy trial claims raised in *People v. Blakely,* 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974), the holdings in the two cases, as to that issue, are functionally identical. There was no "new law" created, and there was no due process issue, let alone a due process violation.

Because there is no New York Constitutional provision similar to the Sixth Amendment's speedy trial rights, the New York courts have always treated the statutory speedy trial rights as if they were the functional equivalent of the Sixth Amendment rights. See, generally, *People v. Prosser,* 309 N.Y. 353, discussion at 356, 130 N.E.2d 891 (1951). Unfortunately, the term "speedy trial" is used to mean two different things. In C.P.L. §30.20 (as in its predecessor, C.C.P. §§8 and 668) it is used in the classical Sixth Amendment sense, while in C.P.L. §30.30 the phrase is used as a substitute for "ready for trial."

*As part of the plea process, defendant (petitioner) signed an agreement which included an acknowledgement that the defendant was waiving certain Constitutional rights, pursuant to *Boykin v. Alabama,* 395 U.S. 238 (1969). Naturally, a state statutory claim would not be included in the enumeration of Constitutional rights.

Of course, the two sections work together. Section 30.30 requires that the prosecution not delay in preparing for trial, and §30.20 protects a defendant if, notwithstanding a prosecutor's readiness, the defendant is not actually brought to trial within a reasonable time. *People ex rel. Franklin v. Warden,* 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973).

That distinction was always present, and we urge that no defendant could logically conclude that the decision in *People v. Blakely,* 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974) meant that claims under C.P.L. §30.30 were also non-waivable. This is especially so since §30.30 as well as the C.P.L. had not been enacted when the *Blakely* case originally arose.

The state court decision in this case is neither new nor illogical. No Constitutional rights of petitioner were affected by the decision below, and there is no reason to review that decision.

CONCLUSION

None of petitioner's Constitutional rights were adversely affected by the state court's decision in this case, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-2018

SUPREME COURT, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1980

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

Petition For A Writ Of Certiorari To The New York Court Of Appeals

PETITIONER'S REPLY BRIEF

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In The

Supreme Court of the United States

October Term, 1980

No. 80-2018

EDWARD THILL,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

Petition For A Writ Of Certiorari
To The New York Court Of Appeals

PETITIONER'S REPLY BRIEF

PREFATORY NOTE

Respondent's brief confirms what we stated in the Petition, that the State of New York cannot articulate any interest in having the new rule of forfeiture applied retrospectively to Petitioner's 1978 plea.[1] The State also has made no response to

[1] Respondent incorrectly refers to the issue in the State Court as whether by a guilty plea one "waives" the statutory speedy trial claim. Although the Court of Appeals in both *Friscia* and the instant case referred to the concept of "waiver" in its decision, clearly the Court is not speaking of waiver in the traditional sense, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The concept of "forfeiture" is, as argued by Petitioner below, a more useful way to explain the rule announced in *Friscia* and applied in the instant case. See, generally, Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L.R. 1214 (1977). The New York Court of Appeals has now apparently adopted this distinction, *People v. Thomas*, 53 N.Y.2d 338, 441 N.Y.S.2d 650, n.2 (1981).

Petitioner's claim, under the Equal Protection Clause, that the manner in which this new rule was applied absolutely and unreasonably deprives him, and others similarly situated, of rights not necessarily lost by those who are *today* confronted with negotiated plea opportunities following improper denial of their statutory speedy trial claims.

However, Respondent's brief does contain an unanticipated, because untenable, claim that the rule announced in *People v. Friscia,* 51 N.Y.2d 845, 433 N.Y.S.2d 754 (1980), applied so detrimentally to Petitioner whose actions had been governed by the prior law, was not "new law." Petitioner replies.

REPLY ARGUMENT

Respondent's brief proceeds upon several premises:

1. That Petitioner's claim is based only upon *People v. Blakley,* 34 N.Y.2d 311, 357 N.Y.S.2d 459 (1974).

2. That *People v. Blakley* decided a claim now embodied in CPL §30.20, as opposed to CPL §30.30, under which Petitioner's claim in the State Court arose.

3. That therefore the Court of Appeals in this case and *People v. Friscia,* deciding claims arising under CPL §30.30, dealt with "different legal issues" than those recognized in *People v. Blakley.* (for text of statutes, see Appendix A.)

These premises are stated by Respondent in support of the single conclusion and argument that

> [t]here was, therefore, no "new law" created by the decision in *Friscia,* and no due process claim is implicated.
> (Respondent's Brief, p. 2).

None of the premises adopted by Respondent are valid. In any event, the conclusion drawn is neither logical nor correct.

Petitioner's due process claim does not arise solely because of *People v. Blakley*.

More recent cases, in both the New York Court of Appeals and the Departments of the Appellate Division, have recognized explicitly or implicitly the right to appeal a denial of a statutory speedy trial claim pursuant to CPL §30.30 notwithstanding a plea of guilty. See Petition pp. 3-4.

At the time of the entry of the plea in this case, New York State Court Rules recognized that a plea of guilty did not result in a forfeiture of a statutory speedy trial claim. The Office of Court Administration Rules are now the repository of the former Rules of The Administrative Board of the Judicial Conference to which Respondent refers.[2] Those rules, 32 NYCRR §29.5 provided and still provide that only

> . . the failure of a defendant to move for release from custody or dismissal of the prosecution under this Part prior to his pleading guilty or standing trial shall constitute a waiver of such rights. . . .

This rule, since it does not contain the time periods specified elsewhere by the Administrative Board Rules, was not affected by the adoption of CPL §30.30.[3]

CCP §668, considered in *People v. Blakley*, is not "embodied" in CPL §30.20, but is more nearly reflected in CPL §30.30.

It is Section 8 of the Code of Criminal Procedure which is now embodied in CPL §30.20. *People v. McLaurin*, 38 N.Y.2d 123, 124, 378 N.Y.S.2d 692, 693 (1975).

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[2]Rules reprinted in Appendix, A-2-3.

[3]The enactment of CPL §30.30 contained the following provision:

> "This act . . . shall be deemed to supersede any rule of the Administrative Board of the Judicial Conference *specifying periods of time within which a criminal action must be brought to trial*. . . . (L. 1972, Ch. 184, §5). (emphasis added)

Civ. Rts. Law §12, CCP §8, and CPL §30.20, though purely statutory, have been regarded as incorporating most of the federal constitutional speedy trial standards. *People v. Taranovich,* 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975). Often these are treated as involving a federal constitutional claim.

In adopting the CPL in 1971, the New York State legislature did not immediately continue the provisions of CCP §668 or the equivalent, regarding its provisions, such as "next term of court" as archaic and generally ineffectual. With respect to these provisions, as first enacted,

> the CPL neither perpetuates them nor attempts a modernized version in the terms of specific time limitations. . . . if specific time periods are feasible, these should be determined by a special study and action of a specialized legislative or administrative agency. (Richard G. Denzer, Practice Commentary, McKinney's Consolidated Laws, 11 A, Criminal Procedure Law, §30.20, p. 79 [West, 1971]).

Thus, Respondent's statement is inaccurate that "§30.20 is the present embodiment of the speedy trial claims [under §668] raised in *People v. Blakely* [sic]" (Respondent's Brief, p. 4).

The effort to maintain a "time period" definition of the speedy trial right continued with the adoption by the Administrative Board of the Judicial Conference of rules requiring the trial of criminal cases within certain time periods. 22 N.Y.C.R.R. Part 29 The New York legislature then enacted CPL §30.30 (set forth in Petition, Appendix D) effective May 1, 1972, the same date the Administrative Board Rules were to have gone into effect. This legislative enactment "continues the Administrative Board's 'time period' approach to the 'speedy trial' problem." See, Richard G. Denzer, Practice Commentary, McKinney's Consolidated Laws, 11 A, supplementary pamphlet, §30.30, p. 64 (West, 1980). Although CPL §30.30 measures to the time at which the People are ready for trial, as opposed to the time of the trial itself, as a method

for enforcing the "time period" approach, the distinction between a "speedy trial" and "ready trial" rule to which Respondent refers has only been utilized by the Court of Appeals in deciding how to apply the statute in different cases. E.G. *People v. Osgood*, 52 N.Y.2d 37, 436 N.Y.S.2d 213 (1981). It is not a distinction relevant to, or relied upon by the Court of Appeals in the instant case.

The distinction which is relevant, as recognized in the language of the Court of Appeals, is whether the particular speedy trial claim raised derives from statute or invokes Constitutional rights. Regarding a claim under CPL §30.20, as necessarily raising a constitutional claim, the Court of Appeals determined that the defendant's claim in *Friscia* under §30.20 was not forfeited by a plea of guilty. It is only what the Court of Appeals describes as the "statutory right" to dismissal, CPL §30.30, that the Court of Appeals held forfeited by a plea of guilty. This distinction was perhaps obscured by the obviously inaccurate assertion in Respondent's brief that "the New York courts have always treated the statutory speedy trial rights as if they were functionally equivalent to the Sixth Amendment rights." (Respondent's Brief, p. 4).

The similarity between CCP §668 and CPL §30.30 is far more substantial than any difference described by Respondent. There is a continuity between CCP §668, the Administrative Board rules, and CPL §30.30. The two statutes are merely different approaches to placing the burden on the State to ensure the forward progress of criminal cases according to ascertainable time periods, in default of which the indictment might be dismissed. Any difference between the approach of the former and present speedy trial statutes is not such as to justify a conclusion that, with respect to the procedural question of appealabiltiy of such claims following a plea of guilty, *People v. Blakley* and *People v. Friscia* (and *People v. Thill*) deal with any different legal issues. Neither in *Friscia* nor in the instant case did the Court of Appeals suggest that this

change in the law was compelled by any difference between CCP §668 and CPL §30.30. The Court merely decided to institute the opposite rule.

Indeed, *People v. Blakley,* although deciding a claim under CCP §668, was decided two years after the effective date of CPL §30.30. In ruling on the issue of forfeiture, the Court of Appeals, without differentiating between claims arising under the former CCP §668 and CPL §30.30, stated

> The improper denial of a motion to dismiss the indictment on the grounds that the defendant has not been afforded a speedy trial survives a plea of guilty and may be raised on appeal (*People v. Wallace,* 26 N.Y.2d 371, 310 N.Y.S.2d 44, 258 N.E.2d 904; *People v. Henderson,* 20 N.Y.2d 303, 305, 282 N.Y.S.2d 734, 735, 229 N.E.2d 422, 423; *People v. Chirieleison,* 3 N.Y.2d 170, 164 N.Y.S.2d 726, 143 N.E.2d 914). [34 N.Y.2d at 314, 357 N.Y.S.2d at 461]

Surely had the Court of Appeals in *Blakley* intended or understood this rule to apply only to cases under CCP §668, rather than the existing statute, it would have said so.

The decision in *Blakley* went further in its decision than acknowledged by Respondent. It stated:

> Because the criminal justice system should scrupulously avoid the possibility that a plea of guilty may be tainted by unfairness . . . and because prosecutors should not be allowed to submerge speedy trial challenges, and the societal interests they represent, in plea bargains, we hold that a reduced plea conditioned upon a waiver of a speedy trial claim must be vacated. (34 N.Y.2d at 315, 357 N.Y.S.2d at 462).

Although this holding was unprecedented, the Court of Appeals nevertheless again avoided differentiating between claims under the former CCP and those which might be raised under the then existing CPL. This strongly implies that the same rule of procedure applied under the correlative provision

of the CPL, §30.30. When the "societal interests" mentioned by the Court of Appeals in *Blakley* are reviewed, it is apparent that they are as well reflected in CPL §30.30.

Respondent's sole conclusion and argument is that the rule in *Friscia* was "not new".

This seems to imply that the same rule finds earlier expression in the cases: it does not.

Respondent then suggests that "no defendant could logically conclude that the decision in *People v. Blakely* [sic] . . . meant that claims under CPL §30.30 were also *non-waivable*". (Respondent's Brief p. 5). Of course, the *non-waiver* rule of *Blakley* is not at issue here, only the rule that, upon a plea of guilty, a defendant does not forfeit a right to appeal a denial of a statutory speedy trial claim.[4] As to that rule defendants, and Petitioner Thill included, had every right to believe that *Blakley* continued the practice for all statutory speedy trial claims, especially in the absence of any suggestion in that decision that its holding was limited to cases arising under the statute repealed two years previous.

The New York Court of Appeals has rejected the proposition that its cases applying the speedy trial provisions of the Code of Criminal Procedure are not relevant to cases deciding such claims under the CPL. *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975).

Apart from the cases cited in the Petition, the existence and operation of the rule of non-forfeiture is best demonstrated by

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[4]Given the general rule that a defendant may waive *any* right, the non-waiver rule in *Blakley* surely demonstrates a zeal for the protection of statutory speedy trial claims which enhanced the expectation of Petitioners and others that their right to appeal would not be foreclosed by pleading guilty in the *absence of a formal waiver*.

the failure of the Respondents to raise the claim of forfeiture on Petitioner's initial appeal, and until after the Court of Appeals decisions in *People v. Lomax*, 50 N.Y.2d 351 (1980) and *People v. Brothers*, 50 N.Y.2d 413 (1980); the rule is demonstrated by the very language of those two decisions suggesting that "it may be that a subsequent plea of guilty . . . should be held to have operated as a waiver of the statutory entitlement to dismissal" (50 N.Y.2d at 418), see Petition, p. 4. What better proof of the existence of the rule, and the Court of Appeals' intention to change the rule, than this invitation to prosecutors to urge its demise?

Respondent's conclusion, that the rule of forfeiture in *Friscia* was not a new rule, is finally obtained only by superordination of will over fact and logic.

CONCLUSION

Respondent's treatment of the New York State scheme for protection of speedy trial interests is far more complicated than accurate. Claiming that Petitioner relies exclusively on the 1974 decision, *People v. Blakley*, Respondent endeavors to prove that the *Blakley* decision alone might not have *compelled* the conclusion that claims for dismissal under CPL §30.30, just as under CCP §668, survive guilty pleas. However, in adopting this tactic, Respondent ignores and fails to dispute the fact that this rule is nevertheless the one followed in all New York Courts until the Court of Appeals, *sua sponte*, suggested a change.

Most important, Respondent offers no reason why this Court should not grant the writ as an important opportunity to limit the extent to which overruling decisions *contracting* defendant's rights might be allowed under the Constitution to act

adversely and inequitably with respect to persons who acted in reasonable reliance on prior law.

Respectfully submitted,

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DATED: September 14, 1981

APPENDIX A

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NEW YORK CIVIL RIGHTS LAW

§12. Rights of persons accused of crime

In all criminal prosecutions, the accused has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor. An alien is not entitled to a jury, composed in part of aliens or strangers, in an action or special proceeding civil or criminal.

NEW YORK CODE OF CRIMINAL PROCEDURE

(Repealed, L. 1970 Ch. 996 §1, Effective September 1, 1971)

§8. Rights of defendant in a criminal action

In a criminal action the defendant is entitled

1. To a speedy and public trial,

* * *

§668. When a person indicted is not brought to trial at the next term thereafter.

If a defendant, dicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the Court in which the indictment is triable, after it is found the Court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary be shown.

APPENDIX A

NEW YORK CRIMINAL PROCEDURE LAW

§30.20 Speedy trial

After a criminal action is commenced, the defendant is entitled to a speedy trial.

§30.30 Speedy trial; time limitation

(Reprinted in part in Petition at Appendix D)

OFFICE OF COURT ADMINISTRATION RULES

22 N.Y.C.R.R. Part 29 (in part)

§29.2 Dismissal of Prosecution Where Trial is Delayed for More Than Six Months

(a) In any criminal cause other than a prosecution for homicide, whether the defendant is in custody or at large on bail or on his own recognizance, the court shall dismiss the prosecution with prejudice, if the cause has not been brought to trial within a period of six months from the date of his arrest, except that, in computing such period of six months, any period specified in section 29.3 shall not be counted.

(b) An order dismissing the prosecution pursuant to this rule may be made only upon application of the defendant on notice to the district attorney or the Attorney General, as the case may be, and after opportunity for hearing.

§29.3 Extensions of Periods for Good Cause

In computing the period of 90 days provided for in section 29.1 and the period of six months provided for in section 29.2, any period of delay as hereinafter specified shall not be counted and the periods provided for in sections 29.1 and 29.2 shall be deemed extended accordingly for good cause:

APPENDIX A — Office of Court Administration Rules
22 N.Y.C.R.R. Part 29 (in part)

(a) Any reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to proceedings for the determination of his competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges and the period during which such matters are under consideration by the court;

(b) Any period of delay resulting from an adjournment or continuance granted by the court at the request of the defendant or with his consent, except that no such consent given by a defendant who is not represented by counsel shall be effectual unless the defendant has first been advised by the court of his right to counsel, his rights under this Part and the effect of his consent; or

(c) Any reasonable period of delay resulting from an adjournment or continuance granted by the court at the request of the People, without the defendant's consent:

(1) on a showing by the district attorney or Attorney General, as the case may be, that he requires such adjournment or continuance to obtain evidence material to the People's case which he has been unable to obtain despite the exercise of due diligence and reasonable grounds are shown to warrant the belief that such evidence will become available within such period;

(2) because of the absence or unavailability of the defendant;

(3) because of the detention of the defendant in another jurisdiction, provided the district attorney or Attorney General, as the case may be, has made reasonably diligent efforts to obtain the presence of the defendant for arraignment and trial;

(4) because of the fact that the defendant, through no fault of the court, is not represented by counsel;

(5) because of the defendant's being joined for trial with a codefendant as to whom the time for trial has not run and good cause is not shown for granting a severance; or

(6) because of any other exceptional circumstances which, in the judgment of the court, warrant the granting of such adjournment or continuance.

* * *

§29.5 Waiver by Defendant

A demand for a speedy trial is not necessary for the purpose of invoking the rights conferred by this Part. However, failure of a defendant to move for release from custody or dismissal of the prosecution under this Part prior to his pleading guilty or standing trial shall constitute waiver of such rights, except that this section shall be inapplicable to a defendant not represented by counsel.

§29.6 Expedited Trial

The case of any defendant detained while awaiting trial shall be placed upon an expedited calendar and, so far as practicable, shall be given trial priority.

§29.7 Effective Date

This Part shall take effect on May 1, 1972.